NO. 82-2070

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

INTERNATIONAL SOCIETY FOR
KRISHNA CONSCIOUSNESS,
Appellant,

v.

CHARLES F. MARSLAND, JR.,
in his capacity as
Prosecuting Attorney, City and
County of Honolulu,
Appellee.

ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

BRIEF OPPOSING MOTION TO AFFIRM OR DISMISS

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ISKCON HAWAII, INC.

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BRIEF OPPOSING MOTION TO AFFIRM OR DISMISS

I. APPELLEE DID NOT ARGUE AND THE LOWER COURTS DID NOT FIND THE ZONING ORDINANCE TO BE A TIME, PLACE, AND MANNER RESTRICTION ON THE EXERCISE OF RELIGION.

Appellee (Prosecuting Attorney, City & County of Honolulu) has moved to affirm the decision of the Hawaii Supreme Court prohibiting the continued occupancy by more than five ISKCON church members of temple premises in the practice of their religion. The construction and application of the Honolulu zoning ordinance to regulate Appellant's religious practice and to effectively exclude it from a district where churches are permitted is said to constitute a permissible "time, place, and manner" restriction on the exercise of religion. According to

the Prosecuting Attorney, Appellant may be constitutionally required to relocate its temple to some other area of the county which may permit a religion such as Appellant's. (Motion to Affirm or Dismiss, page 8.)

These attempts to justify the ordinance as necessary and reasonable are raised for the first time on this appeal. Neither the trial court nor the Hawaii Supreme Court made any of the determinations concerning impact on religious freedom, necessity for regulation, or "narrow tailoring" of the ordinance, referred to in the cases cited by the Appellee. Nor could they have done so based upon the facts presented to them.[1] In-

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1. Appellee offers unsupported conclusions, contradicted by the testimony cited in the Jurisdic-

stead both courts accepted the argument made at pages 10 and 27 of Answering Brief of Plaintiff-Appellee to the Hawaii Supreme Court:

> 4. A mere showing of statutory violation entitled Plaintiff to equitable relief.

There is no evidence or findings by the lower courts of a "slight burden" on protected constitutional rights (Young v. American Mini Theatres, 427 U.S. 50 (1976) at 72, n.35), that there exist "adequate alternative channels of communication" (Young, supra at 75-6), that the ordinance is

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tional Statement, speculating about the impact on Appellant's exercise of religion. It also disregards testimony of Rev. Gene Bridges, a Unitarian minister, on the likely impact of the City's construction on other Hawaii religions. [Transcript of October 25, 1978, at 8-36.]

"narrowly tailored to further the State's legitimate interest" (Grayned v. City of Rockford, 408 U.S. 104 (1972) at 116-7 and Young, supra, at 56, n.12), or other facts that Appellee claims would justify a restriction on the exercise of constitutional rights. Rather, as noted in Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981):

> None of the justifications asserted in this court was articulated by the state courts and none of them withstands scrutiny. [452 U.S. at 72.]

II. THERE WAS NO EVIDENCE OR CONSIDERATION OF THE EXISTENCE OF CONSTITUTIONAL ALTERNATIVES FOR APPELLANT'S EXERCISE OF RELIGION.

Appellee argues for the first time on this appeal that constitutionally adequate alternatives are available for the exercise of Appellant's

religion: that Appellant may operate as a monastery in the present zoning district and that Appellant might be able to re-locate to other areas of the county.

The first point constitutes a grave misstatement of facts, while the second was never raised at all below.

Both the trial court and the Hawaii Supreme Court were well aware, from testimony and evidence before them (e.g., Plaintiff's Exhibits 1 and 4, Transcript of February 8, 1979, at 35-6 and Opening Brief of Defendant-Appellant at 12- 13), that Appellant had been denied any conditional use permit for its temple based upon a determination of zoning officials that Appellant was <u>not</u> classifiable

as a monastery.[2] Thus the lower courts did not rely on this "alternative channel" as justifying a restriction on First Amendment right.

Appellee also argues for the first time that it may be possible for Appellant to practice its religion in certain other zoning districts. But there is absolutely no evidence to show that Appellant would be permitted its religious exercise in such districts, the number and location of such districts within the county, or the State's necessity for restricting

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2. Appellant was not a "monastery" because devotees did not lead a cloistered life, but had considerable contact with the lay community. (Plaintiff's Exhibit "4".) The lower courts thus construed and applied the ordinance to find that Appellant violated the "single family dwelling" provision of the zoning ordinance.

Appellant's church, but not other churches, to any alternative areas as might exist.

III. THERE IS NO BASIS IN THE DECISIONS AND EVIDENCE BELOW FOR THIS COURT TO MAKE THE ADDITIONAL FINDINGS AND CONCLUSIONS REQUESTED BY APPELLEE.

Appellee concludes at page 8 of its Motion to Affirm that:

> . . . [I]t remains for this Court to determine whether or not the interests which the statute serves are sufficient to justify the restriction on Appellant's activities.

While such a determination must ultimately be made by some court in order to protect vital constitutional rights, there is no basis for such a determination as urged by Appellee. As noted by Justice Blackmun in a concurring opinion in Schad v. Bor-

ough of Mt. Ephraim, 452 U.S. 61 (1981):

> In order for a reviewing court to determine whether a zoning restriction that impinges on free speech is "narrowly drawn to further a sufficiently substantial governmental interest", ante at 68, the zoning authority must be prepared to articulate, and support a reasoned and significant basis for its decision. [452 U.S. at 77.]

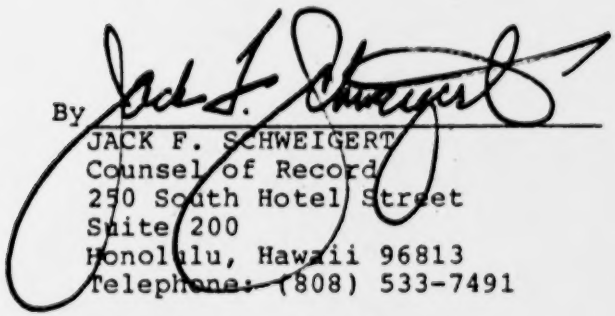
IV. CONCLUSION

The lower courts, at the request of Appellee, have adopted a construction of the ordinance which precludes a weighing of the impact on religious freedom and the sufficiency of any countervailing State interest. There is no evidence of the facts which the City agrees are necessary to constitutionally restrict First Amendment rights. Under these circumstances

the judgment upholding the constitutional validity of the ordinance should be reversed.

DATED: Honolulu, Hawaii, September 15, 1983.

Respectfully submitted,

By 

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PROOF OF SERVICE -
CERTIFICATE BY BAR MEMBER

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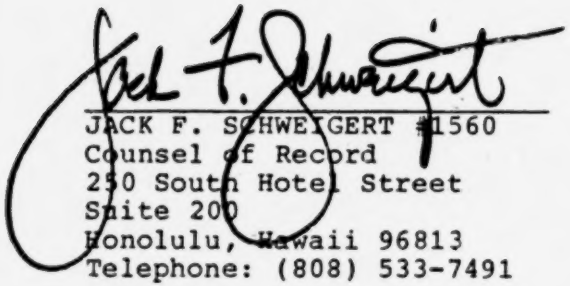
PROOF OF SERVICE -
CERTIFICATE BY BAR MEMBER

I, JACK F. SCHWEIGERT, the attorney for Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that all parties required to be served have been served and that on the 21st day of September, 1983, I served copies of the foregoing Brief Opposing Motion to Affirm or Dismiss on the parties as follows:

1. On CHARLES MARSLAND, JR., as Prosecutor for the City and County of Honolulu, State of Hawaii, Appellee in this action, by delivering three copies thereof at his office at 1164 Bishop Street, Honolulu, Hawaii, 96813, to an employee therein.



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